SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 78-50

MORRIS WELLS, ... **PETITIONER**

VS:

COMMONWEALTH OF KENTUCKY, ... **RESPONDENT**

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

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VS:

COMMONWEALTH OF KENTUCKY, ... RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

Petitioner respectfully prays that a Writ of Certiorari issue to review the final opinion and judgement of the Kentucky Supreme Court entered in the above case on April 11, 1978.

OPINION BELOW

The Opinion of the Kentucky Supreme Court is reported at Ky. 562 S.W. 2d 622 (1978) and is set forth in Appendix A hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTION PRESENTED

Is it a violation of the due process clause of the Fifth and Fourteenth Amendments for a state trial court to ignore evidentiary statutes and expand the scope of criminal rules during the course of a trial without giving fair warning to the accused?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fifth, Sixth and Fourteenth Amendments and Article I, Section 10 of the United States Constitution are set forth in Appendix B hereto. Appendix C contains the relevant state statutes and procedural rules.

STATEMENT OF THE CASE

Petitioner, Morris Wells, was indicted under Indictment No. 6088 on July 9, 1975 by the Johnson County Grand Jury for the wilful murder of one James Byrge. Trial in the Johnson Circuit Court began August 29, 1975, but resulted in a mistrial when the jury was unable to reach a verdict. During the course of the trial Mary Wells, at that time

divorced from petitioner, took the stand and testified as a material witness for the Commonwealth.

Subsequent to the first trial, but prior to the second trial now under review, petitioner and Mary Wells were remarried. Before the second trial began Mrs. Wells wrote a letter on November 9, 1976, to the trial court judge in which she stated she had married the petitioner and desired to invoke her wifely privilege against testifying against her husband pursuant to KRS 421.210. Mrs. Wells further asserted her privilege against having her former testimony and any other statements or depositions she had made or given read into evidence against him.

Prior to the commencement of the second trial a hearing was held at which time petitioner objected to the use of Mrs. Wells' prior testimony. The trial Court sustained Mrs. Wells' claim of privilege, but permitted the Court Reporter to read into the evidence her testimony at the former trial.

The second trial began in the circuit court on November 15, 1976. On November 18, 1976, the jury returned a verdict of guilty. Appellant filed notice of motion and grounds for new trial on November 24, 1976. A judgment of conviction affixing sentence at life imprisonment was entered December 1, 1976. Notice of Appeal was filed December 8, 1976.

The Supreme Court of Kentucky affirmed petitioner's conviction in an Opinion rendered January 10, 1978, in case number SC-213-MR. The petitioner filed a petition for rehearing in the Supreme Court of Kentucky on February 10, 1978, and the same was denied by mandate affirming the conviction of petitioner on April 11, 1978.

The petitioner on April 18, 1978, filed with the Kentucky Supreme Court a motion to stay execution of the mandate. An order Granting Stay of Execution and Enforcement of Mandate was entered May 15, 1978, sustaining petitioner's motion to and including July 10, 1978. Judgment was entered and sentence imposed by the Johnson Circuit Court on June 5, 1978. Petitioner is serving a life sentence in the Kentucky Penitentiary.

REASONS FOR GRANTING PETITION

The petitioner respectfully submits that the action of the Kentucky trial court and affirmation of its decision by the Kentucky Supreme Court denied petitioner his fundamental right of a fair trial, thereby depriving him of due process of law as guaranteed by the United States Constitution.

The nature of petitioner's argument can be introduced by the reasoning pronounced in the venerable case of *Calder* v. *Bull*, 3 Dall., 385, 390 (1798) that a law is ex post facto and constitutionally

invalid if it makes criminal acts which were not forbidden when they occurred, if it increases the punishment for criminal acts, or if it "alters the legal rules of evidence, and receives less, or different testimony than the law required at the time of the commission of the offense in order to convict the offender." These are the principles that support a reversal of petitioner's Kentucky conviction.

The Ex Post Facto Clause, of course, is a limitation upon the powers of Congress, and does not apply of its own right to judicial decisions. It is, however, thoroughly engrained in our constitutional history that a comparable judicial enlargement of a criminal act by interpretation is at war with fundamental concepts of due process fairness and fair warning. A law is an ex post facto law if "in [its] relation to the offense, or its consequences [it] alters the situation of a party to his disadvantage" or "takes away or impairs, the defense which the law has provided the defendant" at the time of the offense. *Kring* v. *Missouri*, 107 U.S. 221, 228-229 (1882) (quoting from United States v. Hall, 26 Fed. Cas 84, 86-87 (No. 15,285).

In *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964) this Court reversed a state court decision which was based, as this Court understood it, upon an unexpected judicial expansion of clear statutory language. It wrote (378 U.S. at 352-354):

"There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforseeable and retroactive judicial expansion of narrow and precise statutory language. **** Indeed, an unforseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely, like an ex post facto law, such as Art. I, §10 of the Constitution forbids. * * * If a state legislature is barred by the Ex Post Facto Clause from passing such a law, *it must follow that a State Supreme Court is barred by the Due Process Clause from achieving the same result by judicial construction.*" [Emphasis added].

Petitioner is aware that the broad interpretation of the scope of conduct prohibited by Art. I, §10 pronounced in *Calder* v. *Bull,* supra, has been restricted by later cases such as *Thompson* v. *Missouri,* (1897) (171 U.S. 380), and *Kring* v. *Missouri,* (1882) 107 U.S. 221. Indeed, it is conceded that the accused may not always be entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him.

This Court in *Thompson* v. *Missouri,* 171 U.S. 380, 387 (1897) quoting from Cooley's Treatise on Constitutional Limitations, remarked:

"But so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. *Remedies must always be under the control of the legislature,* and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot, lawfully, we think in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime. c. 9 p. 272." [Emphasis added].

In view of the adjudged cases, it cannot be said that a state statute passed between time of offense and trial affecting modes of procedure is ex post facto in its application unless it deprived the accused of a substantial right existing when the offense was committed which by its consequences, altered the situation of the accused to his disadvantage. *Thompson* v. *Missouri,* 171 U.S. 384. This is precisely the issue now presented to the Supreme Court of the United States. Petitioner was deprived of due process of law because of the unexpected alteration at trial of a long standing statute that if

followed would in all probability have resulted in at least another hung jury.

Arguably, the Kentucky legislature could have repealed KRS 422.150, on which petitioner based his trial strategy, before the date of trial and after commission of the charged offense, without violating due process or the precepts of the Ex Post Facto Clause. If this were the situation, petitioner might be charged with knowledge and fair warning of such a departure in the mode of state law. The legal profession has since the days of the Common Law been responsible for knowledge of statutes prescribed by the legislative branch of government. Clearly, critical principles of fairness are involved when a United States citizen charged with a grave offense is unexpectedly confronted by judicial politicians who usurp legislative prerogative to repeal evidentiary statutes for policy reasons and expand the scope of expressly delineated procedural rules. At a certain point along this scathing path, a citizen is deprived of a fair trial, due process of law, and the benefit of an attorney.

Petitioner relied on the express statutory language of KRS 422.150 which prohibited introduction of prior testimony without his consent. The statute was first enacted in 1893 and during its long and vital history the only exception carved from its language was a 1904 decision that it did not apply to witnesses who deceased between the first

and latter trial. *Fuqua* v. *Commonwealth*, 118 Ky., 578, 81 S.W. 923 (1904). The statute was considered and reenacted by the 1976 Kentucky General Assembly.

Despite the express statutory prohibition against the introduction of such testimony the prosecution was permitted to introduce, over objection by petitioner, the testimony of his wife given at the first trial without such privilege. The testimony was the basis of the prosecution's evidence at the second trial. Petitioner strongly argued for a directed verdict because of the lack of competent evidence. Understandably, petitioner's trial counsel declined to put petitioner on the stand. Petitioner is presently serving a life sentence in the Kentucky penitentiary.

The precise question thus before this court is whether petitioner was deprived of due process by the ruling of the Kentucky Supreme Court repealing KRS 422.150 and pronouncing a modification of procedure, and applying these departures retroactively to the petitioner during his trial for murder.

Petitioner had no fair warning that KRS 422.150 meant anything other than what its clear and unambiguous language indicated. Yet, the state court rules that the statute "can no longer be regarded as having any practical or legal effect."

The Kentucky Court reasoned:

"It is a very old statute. Quite obviously it originated in an era when the constitutioned legitimacy of this type evidence was viewed with considerable skepticism."

In spite of the obvious intention of the 1976 state legislature, the Kentucky Supreme Court felt the statute's protections should not be granted to petitioner.

The Kentucky Supreme Court cited dicta from *Noe* v. *Commonwealth*, Ky., 396 S.W. 2d 808 (1965) which suggested in Note 1:

"Effective January 1, 1965, R.Cr. 7.22 was amended to provide that 'a duly authenticated transcript of testimony given by a witness in a previous trial of the same defendant on the same charge in the same court shall be the equivalent of a deposition.' This being clearly procedural, to the extent of inconsistency between R.Cr. 7.22 and KRS 422.150 the rule prevails." 396 S.W. 2d at 810.

The applicable rules are set out as follows:

"Rule 7.20 USE OF DEPOSITIONS — OBJECTIONS

(1) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or that the witness, is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition had been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, any other party may require him to introduce at that time all of it which is relevant to the part introduced or may later introduce any other parts so relevant.

(2) Objections to receiving in evidence a deposition or part thereof may be made as provided in the Civil Rules.

Rule 7.22 TRANSCRIPT OF PREVIOUS TRIAL TESTIMONY

For the purposes of R.Cr. 7.20, a duly authenticated transcript of testimony given by a witness in a previous trial of the same defendant on the same charge in the same court shall be the equivalent of a deposition. Adopted September 23, 1964, effective January 1, 1965."

The witness whose prior testimony was introduced was Mary Wells, a material witness for the prosecution. She was divorced from petitioner at the time of the first trial and remarried him before the

second trial and asserted her privilege not to testify against him in the latter proceeding, cf. KRS 421.210.

Assertion of privilege is not enumerated by R.Cr. 7.20 as a circumstance permitting a deposition to be used. Clearly, such evidence was incompetent and inadmissible under Kentucky law as it existed at the time of petitioner's trial. The Kentucky Supreme Court recognized this error but stated:

> "It is further contended, however, that even under the Rules of Criminal Procedure the previous testimony of a witness still living, physically capable of testifying, and present within the jurisdiction cannot be admitted as evidence in chief. *Literally, this would appear to be so,* because in enumerating the circumstances under which a deposition may be used R.Cr. 7.20 expressly mentions only the following: 1. that the witness is dead; 2. that the witness is absent from the state; 3. that the witness is unable to attend or testify by reason of sickness or infirmity; and 4. that the party has been unable to reach the witness by subpoena. We think, however, that the Rule is not to be so narrowly construed." [Emphasis Added]

The effect of judicially expanding the scope of clear and unambiguous rules relied on by petitioner coupled with the deletion of KRS 422.150 from Kentucky law, was to deny petitioner his

fundamental right of due process in violation of the sixth and fourteenth Amendments of the Constitution. The evil of such expansive judicial lawmaking and twisting of rules is in its retroactive application during petitioner's trial. Counsel had no fair warning that the Kentucky Supreme Court would ignore the plain meaning of a long standing statute that the state legislature had seen fit to reenact in 1976. Petitioner was deprived of due process, fair warning and fairness by being deprived of reliance on a vital and unambiguous statute and the decisions construing it.

Bouie v. *Columbia,* 378 U.S. 347 noted the potentially greater deprivation of the right to fair notice where the claim is that a statute precise on its face has been unforseeable and retroactively expanded by judicial construction, than in the typical void for vagueness situation. This Court stated:

> "When a statute on its face is vague or overbroad, it at least gives a potential defendant some notice, by virtue of this very characteristic, that a question may arise as to its coverage, and it may be held to cover his contemplated conduct. *When a statute on its face is narrow and precise,* however, it lulls the potential defendant into a false sense of security, giving him no reason even to suspect that conduct clearly outside the scope of the statute as written will be retroactively

brought within it by an act of judicial construction." 378 U.S. 352. [Emphasis Added]

The same standard must be applied to state procedural statutes when they are unexpectedly altered and immediately applied during a criminal trial with the effect of disrupting the accused's defense. The above reasoning is the essence of the Ex Post Facto Clause and the underlying principle is well grounded in the notion of due process. As stated in *Marks* v. *United States,* 430 U.S. 188, 191 (1977):

> "The Ex Post Facto Clause is a limitation upon the powers of the legislature, see Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648 (1798), and does not of its own force apply to the Judicial Branch of government, Frank v. Mangum, 237 U.S. 309, 344, 59 L.Ed. 969, 35 S.Ct. 582 (1915). But the principle on which the Clause is based — the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties is fundamental to our concept of constitutioned liberty."

It follows that an unexpected judicial repeal of a statute central to a citizen's defense, coupled with an unforseeable and retroactive expansion in the scope of procedural rules deprives a person both of a fair trial and due process as guaranteed by the Fifth, Sixth and Fourteenth amendments.

It is axiomatic that a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. *Bouie* v. *Columbia,* supra; *Wright* v. *Georgia,* 373 U.S. 284, 291, 10 L. Ed. 2d 349, 354, 835 S.Ct. 1240. As concerns questions of state procedure, the federal Constitution is not violated unless a state dispenses with any substantial protection with which its existing law surrounds the person accused of crime. *Thompson* v. *Utah,* 170 U.S. 348 (1898). *Thompson* v. *Missouri,* supra, decided by this Court at the same term as *Thompson* v. *Utah,* held that a procedural modification is a violation of constitution when it "materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed." 171 U.S. at 386.

The injury to petitioner in the case now under review was perpetrated not by the legislature, but by the Court. No fair warning can be had when a state court ignores a statute and engrafts new meaning to rules which it substitutes in its place. The damage to the accused is substantial when his counsel in the midst of a trial for a capital offense is shaken by such unexpected lawmaking that only a legislature, by right, is granted. The 1976 Kentucky legislature considered the statute and reenacted it. Petitioner based his trial strategy on the clear and obvious meaning of the state's law. The judicial

alteration of this law, it is submitted, deprived petitioner of a fair trial and deprived him of the due process of law as guaranteed him by the Fifth and Fourteenth Amendments to the United States Constitution.

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CERTIFICATE OF SERVICE

Pursuant to U.S. Sup. Ct. Rule 33(3), I hereby certify that two copies of the foregoing Petition for Writ of Certiorari was mailed to the Honorable Paul D. Deaton, Box 448, Paintsville, Kentucky, Commonwealth Attorney; and to Honorable Robert F. Stephens, Attorney General, New Capitol Annex Building, Frankfort, Kentucky, this the 3rd day of July, 1978.

Dan Jack Combs

DAN JACK COMBS
Attorney for Petitioner

APPENDIX

APPENDIX A

Rendered: January 10, 1978

SUPREME COURT OF KENTUCKY
SC-213-MR

MORRIS WELLS APPELLANT

V.APPEAL FROM JOHNSON CIRCUIT COURT
HON. HOLLIE CONLEY, SPECIAL JUDGE
INDICTMENT NO. 6088

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION OF THE COURT BY
CHIEF JUSTICE PALMORE

AFFIRMING

Morris Wells appeals from a judgment entered pursuant to a jury verdict finding him guilty of murder and fixing his punishment at life imprisonment. KRS 507.020.

The indictment was returned on July 9, 1975. It accused Wells of having shot and killed one James Byrge on or about June 22, 1975. Though for some unaccountable reason the record on appeal does not

contain any of the orders relating to it,[1] other references in the transcript of evidence and briefs disclose that the first trial of the case took place in August of 1975 and ended in a hung jury. The second trial, now under review, was held in November of 1976. The significance of this hiatus is that Mary Wells, a material witness for the prosecution, who was divorced from Wells at the time of the first trial, remarried him before the second trial and asserted her privilege not to testify against him in the latter proceeding, cf. KRS 421.210, thus precipitating what we consider to be the major question raised by the appeal.

It is not necessary to state the facts of the case in great detail. Morris and Mary Wells, after some 12 years of marriage, were divorced in January of 1975. Soon thereafter Mary moved from Winchester, where she and Morris and their two children had resided, to Paintsville. Meanwhile, following the divorce Mary had been seeing Jim Byrge and they were planning to be married. On the night of June 21, 1975, Mary, Jim and Mary's daughter Peggy attended a ball game in which Mary's son Gary participated. Afterward, all four went to Mary's apartment in Paintsville. At some time after

1. RCr 12.56 (now superseded by CR 75.07) directs the trial court clerk to prepare and certify "the entire original record on file in his office, other than depositions not read in evidence," etc.

midnight Morris Wells, armed with a pistol, forced his way into the apartment and engaged in a gun-fight with Jim Byrge. Byrge was mortally wounded.

Mary's testimony at the first trial made it abundantly clear that Morris Wells was the aggressor in the fatal encounter. At the second trial, when she claimed the veil of privilege as his wife, the trial court, over objection of counsel for Morris, permitted the Commonwealth to read into the evidence her testimony given at the first trial.

KRS 422.150 provides that the testimony of a witness recorded at a trial may under appropriate circumstances be used as evidence in a subsequent trial, but that "no testimony so taken shall be used in any criminal case without the consent of the defendant." It is a very old statute.[2] Quite obviously it originated in an era when the constitutional legitimacy of this type of evidence was viewed with considerable skepticism. Even before the advent of our Rules of Criminal Procedure,[3] the court was carving from it exceptions deemed essential to consist with simple justice. Cf. Fuqua v. Commonwealth, 118 Ky. 578, 81 SW 923, 924-925 (1904), in which the proscription against use without

2. See Ch. 269, Section 7, Acts of 1893.

3. The Rules of Criminal Procedure became effective on January 1, 1963.

consent of the defendant in a criminal case was limited to the recorded testimony of witnesses still living.[4] In 1965 RCr 7.22 placed the trial testimony of a witness on the same footing as a deposition, and in Noe v. Commonwealth, Ky., 396 SW 2d 808, 810 fn. 1, it was suggested that to the extent of any inconsistency between KRS 422.150 and RCr 7.22 the Rule prevails. As it would be an utter absurdity to say that testimony given by a witness in court could *not* thereafter be used under circumstances in which, had it been taken by deposition outside the courtroom, it *could* be used, surely it must follow that the statutory proscription against its admissibility without consent of the defendant has been supreseded by the procedural rules applicable to depositions and can no longer be regarded as having any practical or legal effect.[5]

It is further contended, however, that even under the Rules of Criminal Procedure the previous testimony of a witness still living, physically capable of testifying, and present within the jurisdiction cannot be admitted as evidence in chief. Literally,

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4. See also the later cases cited in Commonwealth v. Bugg, Ky., 514 SW 2d 119, 120 (1974). In *Bugg*, the previous testimony was held inadmissible only because RCr 7.22 limits the testimony to "the same charge in the same court."

5. Manning v. Commonwealth, Ky., 328 SW 2d 412,425 (1959), was decided prior to the adoption of the Rules of Criminal Procedure.

this would appear to be so, because in enumerating the circumstances under which a deposition may be used RCr 7.20 (1) expressly mentions only the following: (1) That the witness is dead; (2) that the witness is absent from the state (unless such absence was procured by the party offering his testimony); (3) that the witness is unable to attend or testify by reason of sickness or infirmity; and (4) that the party offering the deposition has been unable to reach the witness by subpoena. We think, however, that the Rule is not to be so narrowly construed. Its clear purpose is to preserve the evidence against the event of the witness' becoming unavailable to testify. This witness, Mary Wells, though living and present, was just as unavailable to the Commonwealth as if she had been dead or out of the state.

"The general principle upon which depositions and former testimony should be resorted to is the simple principle of *necessity* - i.e., the absence of any other means of utilizing the witness' knowledge. If his testimony given anew in court cannot be had, it will be lost entirely for the purposes of doing justice if it is not received in the form in which it survives and can be had. The only inquiry, then, need be: Is his testimony unavailable?" Wigmore on Evidence, Section 1402 (Chadbourne Rev. 1974).

"A disqualification by subsequently acquired interest or the exercise of privilege makes the

witness' present testimony unavailable, and hence should suffice to allow resort to his deposition of former testimony. This doctrine was not accepted in early English common-law practice; which was followed by our courts in a few instances. But it was well established in English Chancery practice, and this would probably be generally followed in our courts." Id., Section 1409.

At its very best, the rule that one party to a marriage cannot be compelled to testify against the other, codified in KRS 421.210, is one of the most ill-founded precepts to be found in the common law. It is enough that it continues to exist at all. When it is encountered it is better to be trimmed than enlarged. Least of all should it be allowed as a gambit to expunge evidence that was perfectly proper and admissible when given. We need not say, of course, that Mary Wells could or should have been compelled to testify at the second trial, but what we do hold is that neither she nor her husband could prevent the use of testimony given by her at a time when she did not have the privilege.

The other claims of error are of less gravity. Whether the search that produced the pistol used by Wells in shooting Byrge was proper is immaterial for the simple reason that the evidence in question was not prejudicial anyway. That Wells shot Byrge was proved by such a superabundance of evidence that no competent juror could have doubted it. The case

would have been equally strong without the gun. If the search was unlawful, which we do not decide, the error in admitting the evidence was harmless beyond a reasonable doubt.

We think it was plainly in error for the trial court to strike the evidence of the character-witnesses Conley and Pierce on the apparent basis that under cross-examination they could not supply the name or names of anyone they had heard discuss Wells' reputation. Again, however, we cannot believe that this testimony, which the jurors, after hearing it, were admonished not to consider, had any substantial bearing on the verdict.

The special prosecutor's characterization of the victim's "crawling away dying" and having "bloody handprints" on the floor, though not literally supported by any evidence to that effect, did not sufficiently differ from what did happen, according to the testimony of Mary Wells, to justify a reversal on that ground. It is just about as bad no matter how it might have been cast in flights and figures of speech. We think there is very little likelihood that this forensic display could have conjured in the minds of the jurors any visions different from what they had preceived from the evidence.

The judgment is affirmed.

All concur.

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* * * * * * * *

APPENDIX B

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this petition are the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Amendment V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Amendment XIV. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws. . ."

Article I, Section 10 [1] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coins a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

* * * * * * * *

APPENDIX C

Kentucky Revised Statutes §422.150. Testimony taken at trial — Use at subsequent trial. — The testimony of any witness taken by a stenographic reporter pursuant to KRS 28.430 may, in the discretion of the court in which it is taken, be used as evidence in any subsequent trial of the same issue between the same parties, where the testimony of such witness cannot be procured, but no testimony so taken shall be used in any criminal case without the consent of the defendant.

Kentucky Revised Statutes §421.210. Competency of certain testimony. — (1) In all actions between husband and wife, or between either or both of them and another, either or both of them may testify as other witnesses, except as to confidential communications between them during marriage, provided, however, that in an action for absolute divorce or divorce from bed and board, either or both of them may testify concerning any matter involved in the action, including questions of property, and provided further, that neither may be compelled to testify for or against the other.

KENTUCKY RULES OF CRIMINAL PROCEDURE

Rule 7.20 Use of Depositions — Objections. (1) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be

used if it appears: that the witness is dead, or that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition had been unable to procure the attendance of the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, any other party may require him to introduce at that time all of it which is relevant to the party introduced or may later introduce any other parts so relevant. (2) Objections to receiving in evidence a deposition or part thereof may be made as provided in the Civil Rules.

Rule 7.22 Transcript of Previous Trial Testimony. For the purposes of RCr. 7.20, a duly authenticated transcript of testimony given by a witness in a previous trial of the same defendant on the same charge in the same court shall be the equivalent of a deposition. Adopted September 23, 1964, effective January 1, 1965.

* * * * * * * *